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No. 85-516

In the Supreme Court of the United States

OCTOBER TERM, 1986

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VERNICE DUBOSE, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR.,
SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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The petition in this case was filed in September 1985, alleging a conflict between the decision below and *Underwood* v. *Pierce*, 761 F.2d 1342 (1985), modified, 802 F.2d 1107 (9th Cir. 1986), on the availability of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). In our original response to the petition, filed in November 1985, we acknowledged the conflict but indicated that the government had sought rehearing of the Ninth Circuit's *Underwood* decision. We accordingly urged the Court to defer action on this petition pending the disposition of the *Underwood* litigation. The Ninth Circuit denied the government's petition for rehearing in *Underwood* on November 18, 1986. This brief sets forth the government's views on the proper disposition of this case in light of the Ninth Circuit's action in *Underwood*.

STATEMENT

1. This attorneys' fee dispute arises out of a challenge to a decision of the Secretary of Housing and Urban Development (HUD) not to implement an "operating subsidy" program for low-income tenants. The operating subsidy program and the associated litigation are described in the government's original response to the petition for certiorari in this case. Here, we note only that the Secretary's decision spawned a series of lawsuits, including, among others, both this action and a nationwide class action brought in the District of Columbia. See *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C. 1976).[1] Although these cases were resolved adversely to the Secretary in district court, both this Court and the Second Circuit issued stays of the district court orders. This Court subsequently granted the government's petitions for writs of certiorari in two other operating subsidy cases. Before the Court could resolve the merits of the operating subsidy dispute, however, the plaintiffs in the various cases and a new Secretary of HUD reached a comprehensive settlement. See *Battles Farm Co.* v. *Pierce*, No. 85-5945 (D.C. Cir. Dec. 12, 1986), slip op. 4.

2. Plaintiffs' counsel in several of the operating subsidy cases, including the instant case, then moved for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Section 2412(d)(1)(A) of that statute provides in pertinent part that a court shall award attorneys' fees to a prevailing party (other than the United States) in any non-tort civil action brought by or against the United States "unless the court finds that the position of the United States was substantially justified."

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[1]The *Underwood* litigation subsequently was transferred from the United States District Court for the District of Columbia to the United States District Court for the Central District of California. *Underwood* v. *Hills*, No. 76-469 (D.D.C. Apr. 5, 1979).

In this case, the Second Circuit rejected petitioners' fee request, holding that "HUD has borne its burden of proving that its litigation position, albeit ultimately unsuccessful, was not unreasonable" (Pet. App. 13). Noting that "[t]he government's position must be evaluated according to the legal justification for its posture throughout the litigation rather than by hindsight after later judicial interpretations of the issues involved" (*ibid.*), the court concluded that "[t]he governing law, to the extent that it existed, did not mandate HUD's surrender early in the litigation" (*id.* at 14). The court also found no evidence that the government's conduct of the litigation "deterred aggrieved tenants from filing suits" (*id.* at 15). And the court noted that the government had not singled out a particular "private party as the victim of an inconsistent interpretation" of the operating subsidy program (*ibid.*).

The court of appeals also found that other factors supported its conclusion. It observed that the stays granted both by this Court and by the Second Circuit seemingly embodied judgments that the government had a reasonable possibility of success (Pet. App. 16), and it noted that "[t]he same is true" of this Court's grants of certiorari (*id.* at 17). Conversely, the court explained that the ~~the~~ government's agreement to a settlement could not be viewed as an admission that its litigation position had been unjustified. The court of appeals reasoned that such an approach "would discourage future settlements," noting that "policy reasons quite apart from the merits of the dispute may, in the last analysis, dictate a premature termination of the litigation." *Ibid.*

3. Fewer than 10 days after the Second Circuit's ruling in this case, the Ninth Circuit held that the government's position in the *Underwood* operating subsidy litigation had *not* been substantially justified, and it therefore sustained an award of attorneys' fees under EAJA. *Underwood* v.

Pierce, 761 F.2d 1342 (1985), modified, 802 F.2d 1107 (1986). In finding an absence of substantial justification, the Ninth Circuit pointed to several considerations. First, it noted that a number of district courts had rejected the Secretary's position, "thus put[ting] [him] on clear notice that his position was without legal basis, but he continued to litigate the issue" (761 F.2d at 1346). The Ninth Circuit also reasoned that the Secretary's decision to settle the litigation on terms that provided the plaintiffs with all the requested relief "undermined" his contention that his legal position was supportable (*ibid.*). Conversely, the Ninth Circuit refused to accord any weight to this Court's stay of the *Underwood* injunction and to its grant of certiorari in two related cases, declining to "speculate as to the Court's intent in issuing those orders" (*ibid.*). And the Ninth Circuit concluded that, in its view of the underlying merits of the dispute, "the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating subsidy program (*ibid.*). The Ninth Circuit subsequently denied the government's petition for rehearing.[2]

ARGUMENT

1. In assessing the plaintiffs' claims for attorneys' fees, both the Second Circuit and the Ninth Circuit purported to apply the same general test of substantial justification: "The government must demonstrate that its position had a reasonable basis both in law and in fact" (761 F.2d at 1346; compare Pet. App. 12 (citation omitted) (" 'Where the government can show that its case had a reasonable basis

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[2]Attorneys' fees were requested in two other operating subsidy suits. In *Battles Farm*, the District of Columbia Circuit declined to award fees; the court found it unnecessary to determine whether the government had been substantially justified in failing to implement the subsidy program because the plaintiffs' claims on that issue were inextricably intertwined with their arguments on other claims as to which the government's position plainly was meritorious. Slip op. 8-13. Resolution of the fee request in *Abrams* v. *Pierce*, No. 75-3009-JWC (C.D. Cal.), has been stayed pending final disposition of *Underwood*.

both in law and fact, no award will be made.' ")). That the courts of appeals reached conflicting conclusions in applying this reasonableness test followed, in large part, from a simple but fundamental disagreement about the strength of the Secretary's position in the operating subsidy litigation. A significant factor in the Ninth Circuit's decision to award fees was its view that "the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating subsidy program (761 F.2d at 1346). The court below, in contrast, concluded from its review of the litigation that "the government's position appeared at first to be supported by persuasive case law" (Pet. App. 15). This disagreement, which concerns the arguable nature of the government's obligations under a statute that was repealed in 1981, plainly does not, standing alone, warrant this Court's consideration.

There is more to these cases, however, than disagreement about the import of a now-defunct statute. Beyond that narrow issue, the courts of appeals reached contrary conclusions about the relevance of other, more generally applicable factors that bear on the EAJA reasonableness determination. The court below, for example, saw the grant of a stay by a superior court, as well as a grant of certiorari by this Court, "as indicative of the * * * view that the government's position was not unreasonable" (Pet. App. 16; see *id.* at 17). The Ninth Circuit, in contrast, refused to attribute any weight to those actions (761 F.2d at 1346). Conversely, the court below declined to "[s]peculat[e] as to the agency's intent in settling," noting that "reasons quite apart from the merits of the dispute" may lead to a negotiated termination of a lawsuit (Pet. App. 17). The Ninth Circuit took a different approach, finding it relevant to the substantial justification inquiry that the government agreed to settle the litigation (761 F.2d at 1346). And the courts disagreed about the weight to be accorded the district court decisions rejecting

the merits of the government's position in the operating subsidy cases. The Ninth Circuit concluded that those decisions put the Secretary "on clear notice that his position was without legal basis" (*ibid.*), while the court below found it impossible to "say that the tally [of adverse decisions] ever became so onesided as to render HUD's position clearly unjustifiable" (Pet. App. 14).[3]

In our view, this divergence in reasoning and result stems from the vagueness of the statute's "substantially justified" formula, as well as from the open-ended nature of the "reasonableness" standard that the courts have used as a proxy therefor. Like the Ninth Circuit in *Underwood*, the lower courts generally have evinced both an inability and a reluctance to develop clear guidelines—in particular, guidelines making use of objective indicia of reasonableness—to govern the resolution of EAJA disputes. In the absence of such guidelines, the courts have reached seemingly conflicting conclusions in cases that present quite similar issues. Compare, *e.g., Keasler* v. *United States*, 766 F.2d 1227, 1232-1233 (8th Cir. 1985) (government not "substantially justified" in a tax case because the legal issue involved had been resolved adversely to the government in one other circuit), with *Wyandotte Savings Bank* v. *NLRB*, 682 F.2d 119, 120 (6th Cir. 1982) (government "substantially justified" even though the issue already had been adversely settled in the Sixth Circuit because the government's

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[3]On this last point, we note that there were differences in the historical record available to the respective district courts at the time they rendered their decisions in these cases. At the time of the district court's initial decision in the Second Circuit case, on December 15, 1975 (Pet. App. 75-102), only two other district courts had rejected the government's arguments. See *Underwood* v. *Hills*, 414 F. Supp. 526, 531 (D.D.C. 1976) (citing cases). But by June 1976, when the district court in the Ninth Circuit case issued its ruling, the district judge was able to cite ten decisions that had rejected the government's operating subsidy arguments, including the decision in this case. See *ibid.*

argument was "a reasonable attempt to reopen a closed question"). And compare *Herring* v. *United States*, 781 F.2d 119, 122 (8th Cir. 1986) (government liable for fees because, even though its litigating position was reasonable, it should have consented to a prelitigation settlement offer), and *Environmental Defense Fund, Inc.* v. *Watt*, 722 F.2d 1081, 1087 (2d Cir. 1983) (fees awarded because government waited too long to settle), with *Ashburn* v. *United States*, 740 F.2d 843, 846 (11th Cir. 1984) (no liability for fees when the government withdrew its assertedly unreasonable position 11 months after the complaint had been filed). The conflict here, in which two courts reached contrary conclusions on essentially identical facts, is only the sharpest example of this phenomenon.

The absence of firm EAJA guidelines also has led to an enormous proliferation in both the number of EAJA cases and the length and complexity of EAJA litigation. According to figures compiled by the Administrative Office of United States Courts, the federal courts disposed of 657 applications for fees and expenses under EAJA in 1986 alone; 555 (or 84%) of these applications were granted. And because the courts have not been willing to reject (or, for that matter, grant) EAJA fee requests upon a showing of objective indicia indicating that the government's position was (or was not) reasonable—indicia that in the operating subsidy litigation included this Court's grant of a stay and of writs of certiorari—virtually all of those fee requests have led to a duplication of the litigation on the merits, as the courts analyzed for a second time the substance of the government's position.

Having said this, we of course recognize that some duplicative inquiries are made unavoidable by the nature of EAJA's "substantially justified" standard. Fee awards are not automatic under the EAJA, which differs from other fee-shifting statutes in its requirement that courts make an

assessment of the strength of a losing case. But the development of clear rules or presumptions that would reduce the complexity of EAJA litigation surely would be healthy. As Justice Brennan has noted in a related context, "[i]n systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases." *Hensley* v. *Eckerhart*, 461 U.S. 424, 455 (1983) (opinion of Brennan, J.). If the Court believes it possible to develop firm EAJA rules, and if it is inclined to undertake the endeavor, this case would provide a vehicle for doing so.

We note, that both the decision below and the ruling in *Underwood* were issued under the version of EAJA enacted in 1981 (Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2325-2330, partially codified at 28 U.S.C. 2412), which expired by its terms on October 1, 1984.[4] Congress subsequently reenacted EAJA as of August 5, 1985. Pub. L. No. 99-80, 99 Stat. 183 *et seq.* While the reenactment left unchanged the statutory language authorizing an award of fees in the absence of substantial justification (Pub. L. No. 99-80, § 2a, 99 Stat. 184), the accompanying legislative history stated that the test for substantial justification "must be more than mere reasonableness." H.R. Rep. 99-120, 99th Cong., 1st Sess. 9 (1985). Despite this statement, we believe that the 1985 reenactment of EAJA, which did not alter the text of the statute in any relevant way, should not be read to modify the test for "substantial justification" that had been applied by virtually all courts prior to 1985.[5] Most courts in

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[4]The statute continued to authorize awards of fees in cases (such as these) that were pending on the expiration date. Pub. L. No. 96-481, § 204(c), 94 Stat. 2329.

[5]In awarding fees under EAJA prior to 1985, 11 courts of appeals (including, obviously, the Second and Ninth Circuits) "agree[d] that the test for determining whether the government's position was 'substantially justified' [was] one of reasonableness." *United States* v. *Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985) (citing cases). The only court to apply a

fact have continued to apply a reasonableness standard in decisions post-dating the 1985 legislation.[6] But the Court might find it appropriate to consider the significance of the 1985 reenactment in a case where its meaning had been considered and addressed by the court of appeals.[7]

3. Finally, we note that the Solicitor General has authorized the filing of a petition for a writ of certiorari in *Underwood*, which now is due to be filed on or before

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semantically different standard was the District of Columbia Circuit, which required the government to demonstrate that its position was "slightly more" than reasonable. *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983), cert. denied, 466 U.S. 936 (1984).

[6]One court, finding the 1985 legislative history "conflicting and inconclusive," has expressly held that the governing standard remains one of reasonableness. *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1288-1289 (5th Cir. 1985). Several other courts of appeals have continued to apply the reasonableness standard without discussion of the 1985 legislative history. See *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986); *Fulton* v. *Heckler*, 784 F.2d 348, 349 (10th Cir. 1986); *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1274, 1276 (7th Cir. 1986); *Herring* v. *United States*, 781 F.2d 119, 121 (8th Cir. 1986) (government is substantially justified when its position is "not unreasonable"); *Yoffe*, 775 F.2d at 449. Cf. *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (leaving it unclear whether the standard is one of "reasonableness" or "more than mere reasonableness"). The Federal Circuit, however, has read "[t]he legislative history of the 1985 amendments [to] indicate[] that substantial justification means more than mere reasonableness on the part of the government," so that the government must show "that it was *clearly* reasonable in asserting its position." *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (en banc) (emphasis in original; footnotes omitted). The District of Columbia Circuit has adhered to its prior view that the government's position must be "slightly more than reasonable" (*Battles Farm Co.*, slip op. 7 n.11), although it has expressed skepticism that there is any meaningful distinction between its standard and one of simple reasonableness (*ibid.*).

[7]Although the petition in this case was filed in September 1985, after the reenactment of EAJA, petitioners do not argue that the 1985 legislation affected the applicable standard.

March 18, 1987. In addition to the substantial justification question that is presented here, the petition in *Underwood* will raise a second significant EAJA issue—when attorneys' fees may be awarded at rates that exceed the statutory limit of $75 per hour. See 28 U.S.C. 2412(d)(2)(A).[8] If the Court concludes that the substantial justification question warrants review, consideration of that question in *Underwood* rather than in this case accordingly might permit adjudication of a fuller range of issues. We therefore suggest that the Court hold the petition here for consideration along with the forthcoming petition in *Underwood*.

CONCLUSION

The petition for a writ of certiorari should be held for consideration along with the petition to be filed in *Pierce* v. *Underwood*.

Respectfully submitted.

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Solicitor General

FEBRUARY 1987

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[8]Section 2412(d)(2)(A) was not affected by the 1985 EAJA amendments.